Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1619

JAMES C. MOSSER,

Petitioner,

v.

WHITE-WELD & COMPANY, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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JAMES C. MOSSER,

Petitioner,

v.

WHITE-WELD & COMPANY, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioner, James C. Mosser, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas entered in these proceedings on November 28, 1979.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fifth Judicial District of Texas is reported in 587 S.W. 2d 485 (Tex. Civ. App. — Dallas, 1979, n.r.e.) and is also reproduced in the Appendix at Pages 4-8. The notice of the Supreme Court of Texas denying the Application for

Writ of Error on November 28, 1979, is reproduced in the Appendix at Page 15.

JURISDICTION

The Court of Civil Appeals for the Fifth Judicial District, Dallas, Texas, entered judgment on August 13, 1979 and denied a Motion for Rehearing on September 17, 1979 (Appendix Page 9-11). The Supreme Court of Texas refused to grant a Writ of Error on November 28, 1979. This Petition for a Writ of Certiorari is filed within ninety (90) days of that date.

Jurisdiction to review the opinion and judgment in question by Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1257(3):

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> > (3) By Writ of Certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

THE QUESTIONS PRESENTED FOR REVIEW

Does the Federal Arbitration Act, 9 U.S.C. § 1, et seq., require enforcement of arbitration provisions in contracts of adhesion.

Does the enforcement of arbitration, under a contract of adhesion, violate an employee's due process of law guaranteed under the U.S. Constitution.

THE STATUTES INVOLVED

The provisions of the federal statutes involved are §§ 2 and 3 of the Federal Arbitration Act:

> § 2. "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.
>
> § 3. "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable toarbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

STATEMENT OF THE CASE

Respondent, White-Weld, a member of the New York Stock Exchange (hereinafter referred to as "NYSE"), became interested in establishing a government bond department in early 1976 and hired Robert Edwards (no longer a party to these proceedings) and Petitioner, James C. Mosser, to establish such a department at its Dallas office. In order to trade in government securities an employee is not required to be registered with the NYSE, but Mosser and Edwards were required to register by White-Weld as a matter of "house policy".

Fulfilling this mandatory condition of employment required the execution of a U-4 Agreement, which provides in pertinent part:

> "I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof, arising out of my employment or the termination of my employment, shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and Rules then obtaining of the New York Stock Exchange, Inc."

Because on the risk involved in setting up a government bond department, Mosser sought and obtained an agreement with White-Weld for a guaranteed $30,000.00 salary for one year. Also, Mosser was to be paid 20% of the gross commissions at any time his sales exceeded the guaranteed salary. (Mathematically, Mosser was to receive 20% of all gross commissions over $150,000.)

Edwards quit a short time into the project, but Mosser continued to work for White-Weld until he was fired on December 1, 1976. At the time of discharge, Mosser was advised that $13,793.61 earned by him as additional commission was being offset by $11,538.48 (representing the amount of Edwards' guaranteed draw).

Mosser brought suit in the 44th Judicial District Court of Dallas County, Texas for his commissions and for wrongful discharge. White-Weld responded with a Motion to Stay Pending Arbitration. Mosser's Motion to Overrule and in Opposition to White-Weld's Motion to Stay first raised the issue that the legislative history of the Federal Arbitration Act showed that contracts

containing arbitration clauses were intended to be between parties of equal bargaining relationship; not between parties of disproportionate bargaining strengths. (Plaintiff's Motion to Overrule, Appendix Pages 1-2.) The trial judge refused to stay the proceedings. (Order Overruling Motion to Stay, Appendix, Page 3). After trial to a jury, judgment was entered in favor of Mosser for his commissions, lost wages, attorney's fees, and costs.

The federal question was also preserved in the Court of Civil Appeals. Mosser argued that arbitration was not required as matter of law because the legislative history of the Federal Arbitration Act showed that it was not intended to apply to contracts of adhesion. However, the Court of Civil Appeals summarily rejected this argument in reversing the judgment of the trial court. (587 S.W. 2d at 487, Appendix, Pages 7-11).

Mosser applied to the Supreme Court of Texas for a Writ of Error to review the judgment of the Court of Civil Appeals. Again he argued that litigation should not be abated pending arbitration because the contract was one of adhesion, and denied due process, and therefore not intended by Congress to be covered by the Federal Arbitration Act. (Application for Writ of Error, Points of Error No. 1 and 2, Appendix, Pages 13-14). The Application for Writ of Error was refused with the notation "no reversible error" on November 28, 1979. (Appendix, Page 15).

REASONS FOR ALLOWANCE OF THE WRIT

I.

The question of whether arbitration clauses in contracts of adhesion should be governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq., has never been before this Court. A contract of adhesion is defined as a standard form printed contract prepared by one party and submitted to another on a take-it or leave-it basis in a situation where no true equality of bargaining power exists. *Standard Oil Company of California v. Perkins,* 347 F.2d 379 (9th Cir. 1965). The U-4 Agreement which Mosser was required to sign as a condition precedent of employment is just such a contract. Thus, there was no agreement to arbitrate by Mosser as contemplated in the Act.

The Act contemplates an agreement to settle the disputes between two parties on an equal footing. The principal support for the Act came from local Chamber of Commerce and trade associates dealing with perishable goods.[1] The majority of the testimony in support of the bill explained that it was designed to cover contracts between people in different states who produced and shipped commodities.[2] The same views were expressed when the bill was again discussed. Senator Sterling suggested,

> "What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce," Mr. Bernheimer, a chief exponent of the Bill, replied 'Yes' entirely. The farmer who will sell his car load of potatoes, from Wyoming, to a dealer

[1] 50 ABA Rep. 357 (1925).

[2] 67th Congress, 4th Session, 3, 7, 9, 10; hearing on S-4213 and S-4214 before the Subcommittee on the Judiciary (1923).

> in the State of New Jersey, for instance."[3]

The members of Congress on several occasions expressed opposition to a law which would enforce a valid arbitration provision contained in a contract between parties of unequal bargaining power.[4] Senator Walsh cited insurance, *employment,* construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it or leave-it basis to the captive customers or employees. *He noted that such contracts "are really not voluntary (sic) things at all" because there is nothing for the man to do but to sign it; and then he surrenders his right to have his case tried by the court . . .*"[5] He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases. Thus, contracts of adhesion are an exception to the provisions for coverage of the Act.

At least one federal district court has dealt with the argument of contract of adhesion and rejected the same. *Rust v. Drexel Firestone, Inc.,* 352 F.Supp. 715 (S.D. NY 1972). The court in *Rust* discussed contracts of adhesion, not in context of the legislative history, but in the context of duress. Moreover, the *Rust* court decided the case on at least three principles (1) arbitration clauses are favored; (2) arbitration comes within the self-regulatory power listed in the NYSE pursuant to the Securities & Exchange Act of 1934, 15 U.S.C. 78a, et seq.; and (3) members of the NYSE are bound by the

[3] Joint Hearings on S-1005 and HR-646 before the Subcommittee of the Judiciary, 68th Congress, 1st Session, 7.

[4] Senate Hearing, *supra,* 9-11. Joint Hearings, *supra,* at 15.

[5] Senate Hearings, *supra,* at 9. (Emphasis supplied)

Constitution and Rules of the Exchange. First, Petitioner respectfully submits that the *Rust* rationale is not based on a thorough understanding of the legislative history of the Act. Certainly, when an individual employee deals with a member firm of the NYSE, he could hardly be considered to be "negotiating on equal footing". At least, this situation was not contemplated by the Congressmen who voted for the Act. They intended to bind to arbitration the parties who could, in fact, negotiate on a common ground. Second, the facts in the present case evidence White-Weld's clout by requiring Mosser to execute the U-4 as a rule of the house even though it was not required as a rule of the NYSE for those employees dealing in government securities.

The contract of adhesion argument was also raised in *Katz v. Shearson Haden Stone, Inc.*, 438 F.Supp. 637, 641 (S.D. NY 1977). The district court did not analyze the argument in light of the legislative history of the Federal Arbitration Act. In fact, the court gave no real consideration to the issue and merely adopted the position of the court in *Rust*.

As is evident from the case law in this Petition, the issue of the enforceability of arbitration clauses in contracts of adhesion has not readily been raised. And, to the best of Petitioner's knowledge, this issue has never been raised in the context of the intent and purpose of Congress in passing the Federal Arbitration Act.

Nevertheless, the affect of the incorrect application of

the Federal Arbitration Act is widespread.[6] The National Association of Security Dealers' Report for 1978 shows 180,749 registered representatives in the United States. The vast majority of those are in the same position as Petitioner. The New York Stock Exchange alone reported 50,053 registered representatives in its 1978 report. There can be little doubt that these individuals had no meaningful choice or bargaining power when they agreed to arbitration provisions as mandatory conditions of employment. They have been forced to surrender their rights to use the courts to settle their grievances, and this surrender has been enforced by courts which have incorrectly understood the scope of the Federal Arbitration Act.

This Court should take an affirmative step to review the legislative history of the Federal Arbitration Act, and speak in clear and unequivocal terms regarding the applicability of the doctrine of contract adhesion to that Act which operates over so many citizens living and working in the United States. Petitioner contends that such an examination would result in a definitive statement by this Court that contracts of adhesion, such as the one involved in the present case, will not be embraced or enforced in a way contrary to the intent of Congress.

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[6] At least two state supreme courts have incorrectly decided the application of the Federal Arbitration Act in relation to its legislative history. *Youmans v. District Court in and for City of Denver*, 587 P.2d 487 (Sup. Ct. Col., en banc, 1979); *Episcopal Housing Corporation v. Federal Insurance Company*, 239 S.E. 2d 647 (Sup.Ct. So.Car., per curiam, 1977).

II.

Does the enforcement of arbitration, under a contract of adhesion, violate an employee's due process of law guaranteed under the U.S. Constitution?

Simply stated, the requirement of an employee to arbitrate with the New York Stock Exchange denies him access to the courts of the United States and the employee's right to due process under the law. *U.S. Constitution, Amendments 5 and 14.* Moreover, the lower courts determination mandating arbitration in the face of the employee's rights under the New York Stock Exchange's Constitution, deprives the employee's right to trial by jury. *U.S. Constitution, Amendment 7.* A registered representative (non-member) such as Mosser also cannot be forced to arbitrate under the Constitution of the NYSE.[7]

Section 1 of Article VIII of the NYSE Constitution provides:

> "Any controversy between parties who are members, allied members, member firms, or member corporations shall, at the instance of any such party, and any controversy between a non-member and a member or allied member or member firm or member corporation, or the dissolution of a member firm or member corporation, shall, *at the instance of such non-member* be submitted for arbitration, in accordance with the provisions of the Constitution and Rules of the Board of Directors." (Emphasis supplied.)

[7] A non-member is defined by Article I of the NYSE Constitution as "a party not a member, allied member, member firm or member corporation". There is no dispute that Mosser is a non-member as defined by the Constitution and Rules of the NYSE.

Likewise, Section 6 of Article VIII of the NYSE Constitution, entitled "Non-member Controversies", provides:

> "Any controversy between a non-member and a member or allied member or member firm or member corporation, arising out of the business of such member, allied member, member firm or member corporation shall, *at the instance of such non-member,* be submitted for arbitration as provided herein below." (Emphasis supplied.)

These constitutional provisions from the New York Stock Exchange are in diametric and irreconcilable conflict with the rules promulgated by the NYSE which appear to compel arbitration at the insistence of either party under which Mosser executed his U-4 Application.[8-9]

At least one court cited by the Court of Civil Appeals has held that there really is no such conflict. *Youmans v. District Court in and for City of Denver, supra* at 487, 489. The *Youmans'* court held that a registered representative had *waived* his insistence on arbitration by execution of his application for employment. To hold that Mosser has waived his constitutional right under the NYSE by executing an application for employment

[8] Rule 345(j): "I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or termination of my employment shall be settled by arbitration *at the instance of any such party* in accordance with the arbitration procedure prescribed in the Constitution and Rules then obtaining of the New York Stock Exchange."

[9] Rule 347: "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, *at the instance of any such party*, in accordance with the arbitration procedure prescribed elsewhere in these Rules."

consistent with the Rules, but inconsistent with the Constitution, in the nadir of logic and common sense. The Rules of the NYSE cannot supersede or take away Mosser's constitutional rights, and an application for employment pursuant to those Rules is void ab initio if inconsistent with the NYSE Constitution. The *Youmans'* court's reasoning that the registered representative, such as Mosser, had agreed to arbitration by filling out the application could be defined as nothing less than pure sophistry. The Constitution of the NYSE gives Mosser the election to initiate arbitration. The arbitration provision executed pursuant to Rule 347 permits him to be taken to arbitration against his will. To hold, as did the *Youmans'* court, that by agreeing to the Rule he waived his protection against arbitration begs the question and burks the issue. Certainly, if the Constitution allows him voluntary election of arbitration, but the Rules prohibit the same, then the contract of adhesion argument is even more implicit in the transaction. What the *Youmans'* court did was attempt to rewrite the NYSE Constitution. If their argument was correct, there would be no reason for the verbiage specifically commanding that a controversy between a member and non-member can be submitted for arbitration only, "at the instance of a non-member". Rather, the word "non-member" would be included in the first clause of Section 1 and the second clause dealing with "at the instance of such non-member", would be unnecessary. The Constitution only requires arbitration in controversies involving non-members "at the instance of such non-

member". *Newman v. Shearson Hammil & Company, Inc.*, 383 F.Supp. 265 (W.D. Tex. 1974). To order Mosser, who is a non-member of the NYSE, to submit to arbitration under the NYSE procedures against his will would be to deny him due process of law.

A.
Due Process of Law

Danford v. Schwabacher, 342 F. Supp. 65 (N.D. Cal. 1972), *appeal dism'd* 488 F.2d 454 (9th Cir. 1973), although factually distinguishable (the registered representative was suing in the capacity of an investor and alleging Rule 10b-5 claims and claims of common law fraud, negligent misrepresentation and breach of fiduciary duty), is particularly applicable to the instant case. The defendant induced the plaintiff, a registered representative and customer of the defendant, to invest as a general partner in the defendant, without informing the plaintiff of the defendant's financial problems. Plaintiff, as an investor, was required to sign two documents in which he agreed to abide by the rules of the NYSE, but which did not mention arbitration. Despite the fact that the plaintiff was a registered representative, who would be expected to know the rules of the NYSE, the court stated at p. 68:

> "It is plain that this case involves complicated legal and factual issues. Court proceedings would afford the parties full discovery, trial by jury, judicial considerations of the points of law, and a full judicial review. *No waiver of these rights should be enforced unless voluntarily and knowingly made.* Here the waiver of the right of access to court exists, if at all, by virtue of plaintiff's signature of

> two documents, neither of which specifically set forth an agreement to arbitrate. Both the second amended partnership agreement and the application for allied membership did no more than to refer to other documents in which the agreement to arbitrate was included. It would seem a harsh result to foreclose access to the court by a waiver thus obtained, particularly in the face of the allegations of fraud. (Emphasis supplied).

The self-regulatory power of the NYSE draws its authority from federal law. *Rush, supra,* at 717; *Legg, Mason and Company, Inc. v. Mackall and Coe, Inc.,* 351 F.Supp. 1367, 1371 (D.C. 1972). The Supreme Court of the United States has said in such instances that the basis of government action is sufficient in order to allow the employee a constitutional claim. This proposition has been consistently stated under union security agreements effectuated pursuant to the national labor laws. *Railway Employees Department v. Hanson,* 351 U.S. 225 (1956); *Abood v. Detroit Board of Education,* 431 U.S. 209, 218, n. 12 (1977). It would be a denial of Mosser's due process and right to the courts to compel him to arbitration under the Rules of the NYSE. The arbitration selected under the procedure set forth in NYSE Rules would very likely be a person who would directly or indirectly benefit from business dealings with one or more individuals similarly situated as Mosser. The United States Supreme Court has held in such circumstances that, even if the arbitrator is actually fair or impartial, impartiality may invalidate arbitration procedures. In *Commonwealth Coating Corp. v. Continental Casualty Company,* 393 U.S. 145 (1968) the court said in such circumstances, at p. 150,

> "We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another."

B.
Rules 345 and 347 Should Not Be Enforced in This Case

The Federal Arbitration Act, 9 U.S.C. Para. 2, provides exceptions to the scope of arbitration:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (Emphasis supplied)

Mosser was not required by the Rules of the New York Stock Exchange to become registered and execute a U-4 application. Instead, White-Weld, because of its own in-house policy, insisted that Mosser become registered even though he was dealing exclusively in government bonds which are exempt from registration. *See, Laupheimer v. McConnell & Co., Inc.,* 500 F.2d 21, 25 (2nd Cir. 1974). Hence, White-Weld used its superior status to insist on a procedure that had no basis under the NYSE Rules of Regulations. The doctrine of equity should not allow White-Weld to now benefit by its own in-house policy which was inconsistent with the procedures, practices, and rules of the NYSE. *Turner v. Fisher,* 222 U.S. 209 (1911).

Insofar as a determination of the basis of Mosser's

wage claim, the NYSE has no particular expertise to contribute which is normally the foundation of the policy behind arbitration. Also, to send Mosser to arbitration would be inequitable because the State has provided a recovery for attorney's fees (which the jury also awarded in this case) in cases such as the present one. *See,* Article 2226, as amended, VACS. Congress intended to subject the NYSE to state regulations and control of employment practices where they are not inconsistent with the federal Act. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 137 (1973). In *Ware,* the Supreme Court spelled out legitimate objectives which the Exchange monitors:

> ". . . And Rule 345(d) spells out tentative measures for 'conduct inconsistent with just and equitable principles of trade,' or 'acts detrimental to the interest or welfare of the Exchange,' or 'conduct contrary to an established practice of the Exchange.' These measures, designed to insure fair dealing and to protect investors, are of the kind directly related to the Act's purposes and ordinarily would not be expected to yield to provisions of state law."
>
> "Rule 347(b) cannot be categorized, as the petitioner suggests, as part of a need for uniform national regulation. There is no revelation in the Act or in any Commission rule or regulation that nationwide uniformity of an exchange's housekeeping affairs is necessary or desirable. And Merrill Lynch has not demonstrated that national uniformity *in the area of wage claims is vital,* in some way, to federal securities policy." 414 U.S. at 136.

Speaking of the interrelationship between the Act and state law, the Court continued at p. 317:

> "Instead, Congress intended to subject the exchanges to state regulation that is not inconsistent with the federal act. Section 6(c), 15 U.S.C. 78f(c) [15 USCS 78f(c)], *explicitly subjects exchange rules to a requirement of consistency with the Act "and the applicable laws of the State in which [the exchange] is located."* "Where the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Co. v. Jensen,* 322 U.S. 202, 209, 88 L.Ed. 1227, 64 S.Ct. 967, 152 ALR 1072 (1944). And we observed in Silver that the scheme of self-regulation provides in some cases for no agency check on exchange behavior and, therefore, "some form of review of exchange self-policing, whether by administrative agency or by the courts, is . . . not at all incompatible with the fulfillment of the aims of the Securities Exchange Act." 373 U.S., at 359, 10 L.Ed.2d 389. (Emphasis supplied.)

The *Ware* case, although distinguishable on the facts, is a classic and compelling example of the proposition that arbitration is not compulsory in spite of Rule 347 of the NYSE. Where other considerations come into play, such as the right of the state to legislate on their own wage claims, the Rule must give way. This is especially true when Mosser would not have right for recovery of attorney's fees in proceeding to arbitration. Notwithstanding the provision for arbitration arose from the termination of employment in *Ware,* the Supreme Court held that the Rule would not be granted supremacy over a California statute authorizing suit to recover wages.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for a Writ of Certiorari was mailed to Mr. John Andrew Martin, Carrington, Coleman, Sloman & Blumenthal, One Main Place, Dallas, Texas, 75201, Attorney for Respondent, White-Weld & Company, Incorporated, by depositing the same in the United States Mail, with sufficient postage affixed thereto, on this the 25th day of February, 1980.

DAVID WATKINS

No. 77-1704-B

In the DISTRICT COURT of
Dallas County, Texas
44th Judicial District

JAMES C. MOSSER,

Plaintiff,

vs.

WHITE-WELD & COMPANY, INCORPORATED and ROBERT EDWARDS,

Defendants.

PLAINTIFF'S MOTION TO OVERRULE AND OPPOSITION TO DEFENDANT WHITE-WELD & COMPANY, INCORPORATED'S MOTION TO STAY

COMES NOW James C. Mosser, Plaintiff, and files this his Motion to Overrule and Opposition to Defendant White-Weld & Company, Incorporated's Motion to Stay and in support thereof would respectfully show as follows:

1. The agreement out of which the controversy arises is oral, and contains no arbitration agreement. The controversy is decided under Texas common law which holds compulsory arbitration contrary to public policy.

2. The subject matter of the lawsuit is not covered, nor was it intended to be covered, by Congress in the Federal Arbitration Act.

3. The legislative history of the Federal Arbitration Act shows the contracts containing arbitration clauses were intended to be between parties of equal bargaining relationships. A contract of adhesion is not contemplated by Congress to be covered by the Federal Arbitration Act.

4. The legislative history of the Federal Arbitration Act shows that the subject matter of the lawsuit is not a contract "involving commerce".

5. The legislative history shows that the Federal Arbitration Act was remedial and the law of the forum was to be applied.

6. The Federal Arbitration Act clearly limits the application of "commerce" to exclude the contract in the case at bar.

7. If Section 2 of the Federal Arbitration Act does cover this contract, (which is not admitted but specifically denied), Plaintiff is exempted as a worker engaged in interstate commerce under 9 U.S.C. Section 1.

8. It would be inequitable to split the party Defendants, and Plaintiffs would be deprived of his available remedies at law, including attorney's fees, if arbitration were ordered.

WHEREFORE, Plaintiff moves this Court to enter an order overruling Defendant White-Weld & Company, Incorporated's Motion to Stay, and Defendant White-Weld & Company, Incorporated be ordered to proceed with the subject cause of action.

Respectfully submitted,

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No. 77-1704-B

In the DISTRICT COURT of
Dallas County, Texas
44th Judicial District

JAMES C. MOSSER,
Plaintiff,

vs.

WHITE-WELD & COMPANY, INCORPORATED and ROBERT EDWARDS,
Defendants.

ORDER OVERRULING MOTIONS TO STAY

On April 29, 1977, came to be heard the Motions to Stay of Defendants White-Weld & Company, Incorporated and Robert Edwards, having been filed by the Defendants on March 16, 1977; and the Plaintiff's Motions to Overrule and Opposition to Defendants' Motions to Stay having been filed on April 25, 1977; the Court having heard the arguments of counsel offered in behalf of and in opposition of said Motions thereto, and having examined the Briefs filed on behalf of the respective parties, it is,

ORDERED that Defendants' Motions to Stay proceedings herein pending arbitration are hereby overruled.

SIGNED AND ENTERED on this the 11th day of July, 1977.

/s/ Joe Bailey Humphreys
Joe Bailey Humphreys, Judge
44th DISTRICT COURT

COURT OF CIVIL APPEALS
Fifth Supreme Judicial District of Texas
At Dallas

No. 19836

From a District Court of Dallas County, Texas

WHITE-WELD & COMPANY, INCORPORATED,
Appellant,

vs.

JAMES C. MOSSER,
Appellee.

Before Justices Akin, Robertson and Carver

OPINION BY JUSTICE AKIN

August 13, 1979

This is an appeal by White-Weld & Company, a member of the New York Stock Exchange, from an adverse judgment obtained against it by a former employee, appellee Mosser. The principal question on appeal is whether the trial judge erred in refusing to abate the suit pending arbitration pursuant to a written agreement to arbitrate between the parties. We hold that the trial judge erred in refusing to abate the suit pending arbitration. Accordingly, we reverse the judgment and remand with instructions.

Mosser filed suit against White-Weld claiming that it owed him commissions that he had earned while employed by White-Weld. Mosser had sold government bonds in several states for White-Weld. In response to Mosser's petition, White-Weld filed a motion to stay pending arbitration. White-Weld's motion to stay rested upon a written contract between the parties which provided that all controversies arising out of Mosser's employment would be settled by arbitration. The trial

judge overruled White-Weld's motion to stay pending arbitration and ordered the parties to trial, at which Mosser was granted judgment against White-Weld.

White-Weld's motion to stay pending arbitration was based upon the following arbitration clause:

> I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and Rules then obtaining of the New York Stock Exchange, Inc.

This clause appears in an application for employment that both Mosser and a representative of White-Weld signed when Mosser commenced work for White-Weld. This application for employment is referred to as Form U-4 and is supplied by the New York Stock Exchange. The form contains, in addition to the above arbitration clause, various convenants and ethical considerations which a registered representative of the New York Stock Exchange, such as Mosser, agrees to abide by. Apart from Form U-4, Mosser had an oral employment contract with White-Weld concerning his financial compensation. Mosser's suit against White-Weld stems from the parties' disagreement as to the manner in which his commissions were to be computed under the oral contract.

On appeal, White-Weld argues that the arbitration clause is binding on Mosser, and the trial judge erred in not following the provisions of the Federal Arbitration Act, 9 U.SC. §§ 1-14 (1976). Specifically, sections two and three of the Act provide:

2. *A written provision in* maritime transaction or *a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction,* or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable,* save upon such grounds as exist at law or in equity for the revocation of any contract. [Emphasis added].

3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, *the court* in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,* providing the applicant for the stay is not in default in proceeding with such arbitration. [Emphasis added].

White-Weld contends that according to section three, the trial judge correctly overruled White-Weld's motion to stay pending arbitration. First, Mosser contends that the subject matter of this suit, the method of computing commissions under his oral employment contract with White-Weld, is not covered by the arbitration clause. Second, Mosser contends that the employment contract does not involve commerce so as to fall within 9 U.S.C. § 2 (1976). Third, Mosser argues that he falls within the exemption of a worker engaged in interstate commerce under 9 U.S.C. § 1 (1976), which provides that the Act shall not apply to "workers engaged in foreign or

interstate commerce." Fourth, Mosser claims that Form U-4 is a contract of adhesion and that this court should not enforce an arbitration clause contained in such a one-sided agreement. We overrule all of Mosser's contentions because substantially the same arguments have been rejected by other courts in cases involving similar New York Stock Exchange arbitration clauses.

In Dickstein v. du Pont, 320 F.Supp. 150 (D. Mass. 1970), *aff'd*, 443 F.2d 783 (1st Cir. 1971), an employee of a brokerage firm sued the firm for a finder's fee because he helped secure a new client for the firm. The Circuit Court of Appeals first held that the arbitration clause in that case, which is the same clause that appears in Mosser's employment application, compelled the employee to submit his claim for compensation to arbitration. The court also ruled that "the creation of an employment relationship which involves commerce is a sufficient 'transaction' to fall within section 2 of the Act." 443 F.2d at 785. In addition, the court held that the employee was not exempt under 9 U.S.C. § 1 (1976) because the federal courts have construed this section to be limited to persons actually engaged in the movement of goods in interstate commerce. 443 F.2d at 785. This case, therefore, disposes of Mosser's first three arguments. *See* Legg, Mason & Co., Inc. v. Mackall & Coe, Inc., 351 F.Supp. 1367 (D.D.C. 1972); Youman's v. District Court, 589 P.2d 487 (Colo. 1979) (en banc). Likewise, Mosser's contention that the employment application is a contract of adhesion has also been rejected. Katz v. Shearson Hayden Stone, Inc., 438 F.Supp. 637, 641 (S.D.N.Y. 1977); Rust v. Drexel Firestone, Inc., 352 F.Supp. 715, 718 (S.D.N.Y. 1972).

Next, Mosser argues that although similar arbitration clauses may have been enforced by federal courts, state courts should not enforce them because the Federal Arbitration Act was not intended to replace a state's law concerning the enforceability of arbitration clauses. We cannot agree. Our prior opinion in Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex. Civ. App. — Dallas 1973, no writ), resolves this argument because that case held that arbitration clauses falling within the Federal Arbitration Act will be enforced by Texas courts. *See generally,* Youman's v. District Court, 589 P.2d 487 (Colo. 1979) (en banc); Episcopal Housing Corp. v. Federal Insurance Co., 269 S.C. 631, 239 S.E.2d 647 (1977); Miller v. Puritan Fashions Corp., 516 S.W.2d 234 (Tex. Civ. App. — Waco 1974, writ ref'd n.r.e.).

Finally, Mosser contends that White-Weld has made no demand for arbitration and does not want arbitration. Obviously, White-Weld desires arbitration as evidenced by its motion to stay in the trial court and by its point of error in this court on that ground. With respect to making a formal demand for arbitration, 9 U.S.C. § 3 (1976) does not require a party to make an actual demand for arbitration as a condition precedent to filing and obtaining a motion to stay. To remedy any potential delay tactics, however, the trial judge may impose a reasonable time limit on the parties in which to complete arbitration. *See* Katz v. Shearson Hayden Stone, Inc., 438 F.Supp. 637, 642 (S.D. N.Y. 1977); Legg, Mason & Co., Inc. v. Mackall & Coe., Inc., 351 F.Supp. 1367, 1372 (D.D.C. 1972).

Accordingly, the judgment is reversed and this cause is remanded to the trial court, with instructions that the

trial judge shall abate this proceeding and afford the parties a reasonable period of time in which to proceed to arbitration in accordance with their contract.

TED M. AKIN

Ted M. Akin
Associate Justice

In The
COURT OF CIVIL APPEALS
For the Fifth Supreme Judicial District of Texas

No. 19836

WHITE-WELD & COMPANY, INCORPORATED,
Appellant,

vs.

JAMES C. MOSSER,
Appellee.

MOTION FOR REHEARING FOR APPELLEE

TO THE COURT OF CIVIL APPEALS:

Appellee, James C. Mosser, Plaintiff in Cause No. 77-1704-B in the 44th Judicial District Court of Dallas County, Texas, respectfully submits his Motion for Reharing in response to the Opinion of this Court rendered on August 13, 1979, and requests that the Court consider its assignments of error. As in prior briefs, the Plaintiff-Appellee will be referred to as "Mosser", and the Defendant-Appellant will be referred to as "White-Weld". Mosser incorporates by reference the argument and cases cited in his Appellee's Brief, and offers only argument herein on causes not previously referenced.

ASSIGNMENTS OF ERROR

ASSIGNMENT 1. The Court of Civil Appeals erred in holding that the parties must abate this litigation and proceed to arbitration because the arbitration provision was a contract of adhesion not contemplated by Congress to be covered by the Federal Arbitration Act.

ARGUMENT

Youmans v. District Court in and for the City of Den-

ver 580 P.2d 487 (Sup.Ct. Co., 1979) dealt with the issue of the conflict between the Constitution and the Rules of the New York Stock Exchange governing the duty of non-members to arbitrate. That court concluded that Rule 347 did not conflict with Article VIII of the Constitution even though the former allowed either party to initiate arbitration and the latter only a non-member. The court's reasoning that the registered representative had agreed to arbitration could be defined as nothing less than pure sophistry. The Constitution of the NYSE gives the registered representative such as Mr. Mosser the election to initiate arbitration. The arbitration provision executed pursuant to Rule 347 permits him to be taken to arbitration against his will. To hold, as did the *Youmans'* court, that by agreeing to the Rule he waived his protection against arbitration begs the question and burkes the issue. Certainly, if the Constitution allows him voluntary election of arbitration, but the Rules prohibit the same, then the contract of adhesion argument is even more implicit in the transaction.

ASSIGNMENT 2. The Court of Civil Appeals erred in holding that the parties must abate this litigation and proceed to arbitration because the conflict and Rules of the New York Stock Exchange are not binding on Mosser in that they are inconsistent and in fatal conflict with the Constitution of the New York Stock Exchange.

No. _____

In The
SUPREME COURT OF TEXAS

JAMES C. MOSSER,
Petitioner,

vs.

WHITE-WELD & COMPANY, INCORPORATED,
Respondent.

PETITIONER'S APPLICATION FOR WRIT OF ERROR

To The Supreme Court of Texas:

Petitioner, JAMES C. MOSSER, respectfully submits this Application for Writ of Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, seeking reversal of that Court's opinion in Cause No. 19836 in which White-Weld & Company, Incorporated was Appellant and James C. Mosser was Appellee.

Reference will be made to the parties as they appear before this Court or by name.

STATEMENT OF THE CASE

This is an action for unpaid wages for services rendered pursuant to an oral employment contract. The trial court, the Honorable Joe Bailey Humphreys, Judge, 44th Judicial District Court of Dallas County, presiding, entered judgment based on a jury award in favor of Mosser against White-Weld.

On appeal, the Court of Civil Appeals, per Justice Ted Akin, held that the cause of action should have been deferred to the arbitration procedure under the New

York Stock Exchange (herein "NYSE"). Holding the Federal Arbitration Act applied to the parties, the Court of Civil Appeals reversed the trial court's jury award and judgment, and remanded the cause to the trial court, with instructions that the trial judge shall abate the proceeding for the parties for a reasonable period of time in which to proceed to arbitration.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this suit under subdivision 3 and 6 of Article 1728, VACS.

POINTS OF ERROR

Point of Error No. 1

THE COURT OF CIVIL APPEALS INCORRECTLY HELD THAT THE PARTIES MUST ABATE THIS LITIGATION AND PROCEED TO ARBITRATION BECAUSE THE ARBITRATION PROVISION WAS A CONTRACT OF ADHESION NOT CONTEMPLATED BY CONGRESS TO BE COVERED BY THE FEDERAL ARBITRATION ACT.

Point of Error No. 2

THE COURT OF CIVIL APPEALS INCORRECTLY HELD THAT THE PARTIES MUST ABATE THIS LITIGATION AND PROCEED TO ARBITRATION BECAUSE THE RULES OF THE NEW YORK STOCK EXCHANGE ARE IN FATAL CONFLICT WITH THE CONSTITUTION OF THE NEW YORK STOCK EXCHANGE, AND TO COMPEL ARBITRATION WOULD DENY MOSSER DUE PROCESS OF LAW.

Point of Error No. 3

THE COURT OF CIVIL APPEALS INCORRECTLY HELD THAT THE PARTIES MUST ABATE THIS LITIGATION AND PROCEED TO ARBITRATION BECAUSE WHITE-WELD WAIVED ITS RIGHT TO ARBITRATE.

Point of Error No. 4

THE COURT OF CIVIL APPEALS INCORRECTLY HELD THAT THE PARTIES MUST ABATE THIS LITIGATION AND PROCEED TO ARBITRATION BECAUSE THE EMPLOYMENT AGREEMENT BETWEEN THE PARTIES IS ORAL AND DOES NOT CONTAIN AN ARBITRATION PROVISION.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas Nov. 28, 1979

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of MOSSER Vs. WHITE-WELD., No. B-8894

was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

Supreme Court, U. S.
FILED
MAY 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1619

JAMES C. MOSSER,

Petitioner,

v.

WHITE-WELD & COMPANY, INCORPORATED,

Respondent

RESPONDENT WHITE-WELD & COMPANY, INCORPORATED'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Bowne of Dallas Printed in U.S.A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1619

JAMES C. MOSSER,

Petitioner,

v.

WHITE-WELD & COMPANY, INCORPORATED,

Respondent

RESPONDENT WHITE-WELD & COMPANY, INCORPORATED'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondent White-Weld & Company, Incorporated respectfully submits its response to the application for writ of certiorari to the Supreme Court of Texas.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because (i) the few courts (including the court below) which have considered the issues raised by petitioner have all upheld the arbitration clause in question, (ii) such issues

have never been considered by a Federal court of appeals, and (iii) the policy of the New York Stock Exchange to require arbitration of disputes between member firms and their registered representatives has worked well and should not be abrogated.

ARGUMENT

THE COURTS HAVE UNIFORMLY UPHELD THE ARBITRATION CLAUSE IN QUESTION

Petitioner's argument that the arbitration clause in question is a contract of adhesion was fully considered and rejected in *Rust v. Drexel Firestone, Inc.*, 352 F. Supp. 715 (S.D.N.Y. 1973). In *Katz v. Shearson Haden Stone, Inc.*, 438 F.Supp. 637 (S.D.N.Y. 1977), *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. District Court*, 190 Colo. 239, 545 P.2d 1035 (1976), and in this case, the courts have deferred to *Rust's* exposition in rejecting the "adhesion" argument. The adhesion argument was also rejected in *Frame v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App.3d 672, 97 Cal. Rptr. 811 (1971) and in *Ware v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App.3d 35, 100 Cal. Rptr. 791 *aff'd* 414 U.S. 117 (1973). Petitioner adds nothing to the argument which merits the attention of this Court.

Although broker-dealers have attempted to avoid the arbitration clause in question on numerous grounds other than adhesion, both state and federal courts have always found it enforceable.[1] *Drayer v. Krasner*, 572 F.2d 348 (2d

[1]In *Ayres v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532 (3d Cir. 1976) *cert. denied*, 429 U.S. 852 (1976) and *Ware, supra*, the courts found the arbitration clause in question enforceable *per se*. In *Ayres, supra*, the validity of the arbitration clause in an employment dispute was recognized but the 10b-5 dispute in question there was held to "fall outside the perimeter of the rule," *i.e.* Rule 347(b), N.Y.S.E. Rules, which requires arbitration of employee disputes. 538 F.2d at 535. In *Ware, supra*, a California statute requiring litigation of wage disputes was held to supercede the arbitration clause in question. In *Wertheim & Co., Inc. v. Halpert*, 65 A.D.2d 724, 411 N.Y.S.2d 11 (1978) *aff'd* 48 N.Y.2d 681, 421 N.Y.S.2d 876 (1979), a Title VII sex-discrimination claim was not required to be arbitrated.

Cir. 1978) *cert. denied*, 436 U.S. 948 (1978); *Stokes v. Merrill, Lynch, Pierce, Fenner & Smith*, 523 F.2d 433 (6th Cir. 1975); *Dickstein v. duPont*, 443 F.2d 283 (1st Cir. 1971); *Fox v. Merrill, Lynch & Co., Inc.*, 453 F.Supp. 561 (S.D.N.Y. 1978), *Legg, Mason & Co., Inc. v. Mackall & Coe, Inc.*, 351 F.Supp. 1367 (D.D.C. 1972); *Youmans v District Court*, ... Colo. ....., 589 P.2d 487 (1979); *Crawford v. Merrill, Lynch, Pierce Fenner & Smith, Inc.*, 35 N.Y.2d 291, 261 N.Y.S.2d 140, 319 N.E.2d 408 (1974); *Moritz v. Frances I. duPont & Co.*, 291 Minn. 523, 189 N.W.2d 487 (1971); *Mitchum, Jones & Templeton, Inc. v. Chronis*, 72 Cal. App.3d 596, 140 Cal. Rptr. 160 (1977); *Lewsadder v. Mitchum, Jones & Templeton, Inc.*, 36 Cal. App.3d 255, 111 Cal. Rptr. 405 (1973).

THE ISSUES RAISED BY PETITIONER HAVE NEVER BEEN CONSIDERED BY A FEDERAL COURT OF APPEALS

There is no conflict within the federal courts of appeals concerning the questions raised by petitioner for the simple reason that no federal court of appeals has considered these issues. It would be premature therefore for this Court to consider the issues even if they could be described as significant.

THE NEW YORK STOCK EXCHANGE SHOULD BE PERMITTED TO REQUIRE ARBITRATION OF DISPUTES BETWEEN MEMBER FIRMS AND THEIR REGISTERED REPRESENTATIVES

The New York Stock Exchange (the "NYSE") requires that all registered representatives of all member firms execute a standard form of employment contract with the member firm by which he is employed. 2 NYSE Guide (CCH) page 3591. Such contract contains the arbitration clause here in question.[2] The court in *Rust, supra,* stated the policy considerations which led the NYSE in the exercise of the self-regulatory power vested in it by federal securities laws to establish a system of arbitration of disputes arising from NYSE activities. Respondent will not restate the advantages of arbitration, which are well known to the Court. *See Wilko v. Swan,* 346 U.S. 427 (1953). Suffice it to say that the NYSE system of arbitration has suffered few judicial attacks despite the vast numbers of broker-dealers that petitioner shows to be within its reach. Petition for Writ of Certiorari at p. 9. Arbitration has worked well for the NYSE and its member firms and should not be undermined by judicial recognition of the contentions advanced by petitioner.

PRAYER

In light of the fact that the issues raised by petitioner have been uniformly rejected by the few courts that have considered them; in light of the fact that no federal court of appeals has been confronted with the issues raised by petitioner; and in light of the fact that arbitration has

[2]Though petitioner was not required by NYSE rule to be registered with the NYSE since he dealt in exempt securities – government bonds – White-Weld as a matter of firm policy required all its salesmen to register and to execute the standard form of contract.

served the NYSE well in the exercise of its self-regulatory powers, respondent prays that the Petition for Writ of Certiorari to the Supreme Court of Texas filed by James C. Mosser be denied.

Respectfully submitted,

JOHN ANDREW MARTIN
BRUCE W. COLLINS
OF
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL
3000 One Main Place
Dallas, Texas 75250 — 741-2121

By JOHN A. MARTIN

CERTIFICATE OF SERVICE

I, John Andrew Martin, hereby certify that three (3) true and correct copies of the foregoing have been on this the 30th day of April, 1980, deposited in the United States Mail, first class, postage prepaid, to David Watkins, 1212 Mockingbird Tower East, 1341 West Mockingbird Lane, Dallas, Texas 74247.

All parties required to be served have been served.

JOHN A. MARTIN

JOHN ANDREW MARTIN